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IN THE

Supreme Court of the United States

OCTOBER TERM - 1951

No. 258

JOHN STEFANIDIS, CHRISTOFOROS MANGOS, PETROS NTOGRIS, ALEX PLATTIS and COSTOS VOURDAS, *Petitioners,*

VERSUS

STELLIOS KAKAROUKAS, AS MASTER, ATLANTIC MARITIME COMPANY OF PANAMA, INCORPORATED, S. LIVANOS AND COMPANY, INCORPORATED, S. LIVANOS AND COMPANY, LIMITED, AND STAVROS LIVANOS, INDIVIDUALLY TRADING, ETC., AS OWNERS AND/OR OPERATORS OF THE PANAMANIAN STEAMSHIP "ATLANTIC TRADER", ALL NON-RESIDENTS OF THE STATE OF VIRGINIA, AND/OR FOREIGN CORPORATIONS DOING BUSINESS THEREIN: AS WELL AS E. K. DUKE AND G. H. SPAULDING, PARTNERS TRADING AS TIDEWATER PORT SERVICE AND E. T. RICHARDS, THEIR AGENT, *Respondents.*

ON OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

LEON T. SEAWELL,
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Counsel for Respondents.

September 14, 1951
Norfolk, Virginia

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I. STATEMENT

The petition for writ of certiorari seeks to review a judgment entered in the Corporation Court of the City of Newport News, Virginia.

The Supreme Court of Appeals of Virginia has heretofore refused to review the case. By order entered in the Virginia Appellate Court on June 20, 1951 a Writ of Error was refused. The effect thereof is to affirm the judgment of the Corporation Court of the City of Newport News, Virginia.

Under these circumstances, therefore, the only conditions under which a writ of certiorari will issue are:

1. Where the validity of a treaty or statute of the United States is drawn in question;

2. Where the validity of a State statute is drawn in question;

3. Where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States, Title 28, U.S.C.A. Sec. 1257.

Through this brief in opposition to the petition for writ of certiorari, the respondents will show that none of the foregoing conditions or reasons exist and therefore the petition should be denied.

II. SUMMARY OF LITIGATION IN COURTS BELOW

In general the respondents concur with the summary found at pages 2, 3 and 4 of the petition for certiorari.

However, there are several important omissions which should be added.

This suit was filed in the Corporation Court of Newport News, Virginia, on July 11, 1948. The following day, July 12, 1948, a duplicate and similar action was filed in the United States District Court for the Eastern District of Virginia, where it is still pending in the Norfolk Division as No. 7232 on the Admiralty Docket.

Contrary to the statements made in paragraph 5 of the "Request to dispense with printing and to docket cause pursuant to United States Code, Title 28, Section 1916", and to the statement found at top of page 4 of the petition for writ of certiorari, payment in full of the judgment, as entered by the Corporation Court of the City of Newport News, on January 5, 1951, has been tendered to attorneys for petitioners on three occasions, and refused by them.

The order of judgment was entered on the afternoon of January 5, 1951. Immediately thereafter we contacted opposing counsel and offered to pay the same. Our offer was refused. Nevertheless, on January 9, 1951 we forwarded certified checks in payment of the principal judgment, interest and costs to opposing counsel by registered mail, with return receipt requested. This tender was returned to us on January 11, 1951 marked "Refused".

Again, on June 21, 1951, the day after the Supreme Court of Virginia entered its order refusing to review the case, we again orally tendered payment of the judgment, interest and costs to opposing counsel. As before, our tender was refused.

III. TRIAL COURT'S FINDINGS OF FACT ARE BINDING

(A) Essentially all questions on which petitioners seek a writ of certiorari pray for an appellate review of the trial court's findings of fact. Having elected to proceed with the State Court action instead of the Admiralty action in the United States District Court, the petitioners are bound by the laws and statutes of the State of Virginia. Therefore, the decision of the Corporation Court of Newport News on all questions of fact, is a final and conclusive decision. This rule is stated very clearly in the Virginia Code of 1950, Title 8, Sec. 491, which reads as follows:

> "WHEN JUDGMENT OF TRIAL COURT NOT TO BE SET ASIDE UNLESS PLAINLY WRONG, ETC.—
>
> When a case at law, civil or criminal, is tried by a jury and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence, not the facts, is certified, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."

Under this rule the burden is upon appellants to show that the judgment of the lower court is plainly wrong or without evidence to support it.

Updike v. Texas Co., 147 Va. 208, 136 S. E. 591.

It was held in *Martin v. Richmond &c R. Co.,* 101 Va. 406, 44 S. E. 695, that if the evidence is conflicting on material points the judgment will be affirmed.

Therefore, in the present case, conflicts appearing on the vital questions involved, this Court will not undertake to set aside the judgment of the lower court.

Even though these alien seamen seek a review of their case before this Court, they cannot evade the finality of the trial court's decisions of fact.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817.

IV. ARGUMENT

The petition for certiorari presents only three (3) questions. (Page 10 of the Petition). We shall discuss these questions and the evidence bearing thereon in the order in which they are set forth in the Petition.

A. The Petitioners Mangos and Ntogris Are Not Entitled to Any Additional or Futher Wages for Any Periods of Illness or Convalescence.

1. The Claims of Mangos

The trial court granted this seaman a recovery for maintenance and cure. This award is found in the Order of Judgment entered by the Corporation Court of Newport News on January 5, 1951 (R. 92), and reads as follows:

> "To Christoforos Mangos the sum of $152.45, which represents a recovery in the amount of $2.45

for illegal advance on unearned wages, and the recovery of $150.00 for damages for failure to provide prompt medical care, *maintenance and cure.*" (Italics Ours)

Sitting as judge and jury the trial judge has made this award on a decision of fact. The court's decision is therefore completely binding and final in all respects. To this effect see our discussion under Section III of this brief. While there is an abundance of conflicting testimony in the trial proceedings concerning the sickness which Mangos allegedly suffered, the only evidence before the Court concerning the wages and/or maintenance and cure that Mangos should have received is that of the ship's agent, Wayne Chauncey, who said at page 23 of the trial proceedings:

"Q. What payment was made to Mangos?

A. $55.00.

Q. Now, who authorized and supervised and directed that payment?

A. I supervised the payment and being a Panamanian ship I was so authorized.

Q. How did you arrive at the sum of $55.00?

A. We allowed $1.50 per day while the man is in the hospital for incidental expenses, cigarettes and such, and for recuperation period, as it is commonly known, is $5.00 per day during the time the doctor allows him to recuperate from his—

Q. You mean $1.50 a day while he's in the hospital and $5.00 a day when he's not in the hospital?

A. Not in the hospital and recuperating from his hospital stay.

Q. Before he returns to duty?

A. Yes, sir.

Q. Will you tell us just how you arrived at $55.00?

A. Well, we allowed ten days in the hospital at $1.50 would be $15.00, and then eight days recuperation period at 5.00 would give him $40.00, eight days at $5.00.

Q. How did you arrive at eight days recuperation period?

A. Certificate of Doctor Windley's.

Q. May I have that certificate? Doctor Windley delivered that certificate to you?

A. Yes, sir."

It must be remembered that this case involves only the rights and duties between alien seamen employed on an alien ship. Therefore, if the petitioners desired to effect a recovery under the provisions of Panamanian Law, it was incumbent upon them not only to plead the foreign law, but also to prove it. Otherwise the law of Panama would be presumed to be the same as that of the United States. To this effect, see:

The Hanna Nielsen, 25 F. (2) 984, at page 987:

"Foreign law, in any case, is a question of fact to be alleged and proven. . . .

"The remaining question for consideration is: Whether the burden rests upon libellant, or upon claimant, to plead and prove the law of Norway. Until otherwise shown, the law of Norway in a

case such as the present will be presumed to be the same as the law of the United States; and, if it is not, it appears more reasonable to place the burden of showing that fact upon claimant than upon libellant."

When this case was tried before the Corporation Court of Newport News, the only effort by counsel for petitioners to prove Panamanian Law was the offer and filing of plaintiff's Exhibit No. 9, a booklet printed in English and issued by the International Labor Office, Geneva, Switzerland, entitled "Conditions In Ship's Flying the Panama Flag", and plaintiff's Exhibit No. 10, a booklet printed in Spanish and entitled "Official Edition of the Law of Panama". Neither of these exhibits was material nor proper proof of the foreign law.

Yet in this petition for a writ of certiorari, Mangos contends that under Panamanian law he was entitled to his basic wages during the time of his alleged illness and convalescence.

We submit that there was absolutely no proper evidence of any Panamanian law.

The ship's articles under which these seamen were serving are not for a specific voyage. The articles permit seamen to leave the ship when they wish, but only if the seamen are discharged by the ship is there any obligation on the ship-owners. This was fully explained by Captain Kakaroukas during cross--examination and is found at page 85 of his deposition:

Q. What voyage did the articles call for?

A. All over the world. We don't have any specifications on our ship like I presume they do in British ships, where you sign for a special voyage or so much latitude and longitude.

Q. What did the articles say with reference to the voyage?

A. Nothing that is stated. There is a form that you read to them that states they can leave the ship when they wish, but that they can't be discharged unless you repatriate them, at your own expense, under great difficulty.

Q. How long do you obligate yourself to keep them aboard?

A. As long as he wants to stay.

Q. So that as long as a seaman wants to stay, provided his conduct is good he is entitled to remain, is that it?

A. Yes; as long as he is a good man how are you going to tell him to leave.

From the evidence that was presented the trial court correctly found that Mangos had received all wages to which he was entitled. As has been shown, this seaman was given a recovery for maintenance and cure. These were findings of fact as announced by the trial court. There is, therefore, no basis or ground on which the petition for certiorari can be granted.

2. The Claims of Ntogris

Petitioner Ntogris (also spelled Dogris) seeks a writ of certiorari because he was not granted a recovery for wages, etc. during an alleged sickness and convalescence. Basically, therefore, he asks this Court to review a decision of fact. The discussion under Section III of this brief will suffice to defeat such a request.

However, referring to the evidence we find only the testimony of Ntogris himself that he was taken sick while aboard the ship. But even after describing his sickness, he admits that he asked for his seaman's book

(or, in other words to be paid off the ship) and came ashore. This testimony is found at pages 28 and 29 of Ntogris' deposition.

Q. What happened to you when the vessel got to Newport News on this last trip?

A. When we arrived here, one by one we were examined by the doctor at Quarantine, and I complainted of pain in my chest here and my lungs were hardened, and the doctor gave a piece of paper to the mate and told him that I should go out and see him.

Q. Then what happened?

A. I asked the mate to give me my seaman's book to go to the doctor, *and I got my seaman's book* and came ashore, but I didn't know where to go. (Italics Ours).

Q. Then what happened?

A. Then I went to see a lawyer.

Q. And then what happened?

A. Then I went to a doctor, and the doctor examined me and told me he was going to give me some medicine, so I could continue my trade and stay on the boat, but I was having pains and didn't want to go on the trip.

It is evident from the above testimony that nothing was wrong with this seaman. However, the Court was not left to mere conjecture on this point. Dr. Robert T. Peirce, Jr., testified at pages 2, 3, 4, 5, of the trial proceedings, as follows:

Q. Did you, Doctor Peirce, in July 1948 have occasion to examine a man by the name of Petros Ntogris?

A. Yes, sir.

Q. At whose request did you examine Mr. Ntogris?

A. At the request of his attending physician, Doctor Windley.

Q. I see, sir. At the time of your examination, what was Ntogris' physical condition?

A. The results of my examination did not reveal evidence of a physical disease that I could determine. He had some bad teeth. He had a lot of complaints for which we could find no explanation. Doctor Windley had examined him pretty thoroughly and had had a rather exhaustive laboratory study and x-ray study made which did not disclose any disease.

Q. I see, sir. Do you recall just what day you examined him, sir?

* * * * *

A. I saw him on July 15 I think it was, 16th.

Q. July 16, 1948?

A. Yes, sir.

Q. And where did you examine him, sir?

A. At the Buxton Hospital.

Q. He was a patient there?

A. Yes, sir.

Q. All right, sir. You say there had been x-ray examinations and blood tests, various uranalysis, various laboratory tests?

A. Yes, sir.

Q. Were the results of those at your disposal, sir?

A. Yes, sir.

Q. And after examining the man and going over the results of the various x-ray tests, the blood tests and so forth, what was your conclusion?

A. I could find no evidence of physical disease other than some badly diseased teeth.

Q. All right, sir, will you answer Mr. Morewitz' questions please?

A. Yes, sir.

Cross-examination by Mr. J. Morewitz:

Q. Doctor, do you know whether his teeth were taken out or anything done?

A. No, sir.

Q. Doctor, I hand you a copy of the summary of the hospital chart of this man while he was in Elizabeth-Buxton Hospital. What does it mean, "Diagnosis on Discharge—was osteoarthritis.

A. Osteoarthritis. That means a common type of rheumatic disease most of us are subject to sometime during our life, particularly after we pass the age of 40. It's a mild degenerative joint disease that comes on as we grow old that all of us have more or less.

Q. This chart goes on to say the patient's condition remained the same throughout the hospitalization period. He continued to complain of aches and pains but on consultation with another doctor, Peirce—that's referring to you, Doctor?

A. Yes, sir.

Q. Nothing was found. Well, the man that complains that he is still under the weather, even though the doctor can't find anything wrong with him, you haven't done him much good, have you?

A. No, sir.

Q. Well, is there any treatment for the condition that you found there?

A. There is no treatment as such. Frankly, there's nothing to substantiate that diagnosis. The x-rays of his joints are reported as negative. In osteoarthritis there are deposits of calcium which can be determined by x-ray examination."

By way of summary therefore it is apparent that Ntogris has never been entitled to any wages or additional maintenance. The decision of the trial court

in denying him any recovery therefor was a finding of fact and is not subject to review.

B. The Courts Below Correctly Refused a Recovery of Liquidated Damages Under 46 U.S.C.A. 596

The greater portion of the petition for writ of certiorari concerns itself with the failure of the Courts below to grant a recovery of liquidated damages or "two for one" pay under the provisions of Title 46 U.S.C.A. Section 596, which reads as follows:

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned *without sufficient cause* shall pay to the seamen an equal to two days' pay for each and every day during which payment is delayed beyond the respective periods. . ."

Petitioners contend that the mere recovery of disputed advances made it mandatory on the Courts below to award a waiting-time recovery under this statute. This contention is not sound.

The evidence concerning advances of unearned wages was seriously contested by both petitioners and respondents and was in extreme conflict. Petitioners testified that they had received advances of unearned wages, not in the United States itself, but while passing through the Panama Canal. With this evidence they recovered the amounts of the alleged advances, although the conflicting and positive testimony of Captain Kakaroukas was that there had never been any payments or advances of unearned wages to the men. Deposition of Stellios Kakaroukas:

P. 35-36:

> "Q. Captain, on your trip from Alexandria to Chile did you pay the men at all?
>
> A. No.

Q. You didn't pay the men on the trip from Alexandria to Chile?

* * * * *

Q. On the return trip from Chile back to Alexandria were the men paid?

A. No. At Alexandria or Chile, for instance, they might get some money, but it is all money that has been worked.

Q. Well, all I want to know is, where they paid any money?

A. Yes, they got some money at Alexandria; I don't remember, I think it was at Panama they got some money. It says on their paper.

Q. Without those accounts do you recall where they actually got the money?

A. *I don't remember. I think that I gave Ntorgis and Mangos and the others at Panama, but money that they had worked for, because they complained that their families were starving, and I think that they gave some money to the wireless operator who got off the ship and came on at the other side, they gave him money to make out checks for their families, but it was money worked for.* (Italics Ours).

P. 47:

"Q. Now Captain, you have testified here that certain payments were made to the men at Panama, is that right?

Mr. McCoy: Objection. He testified he didn't recall where they were paid.

Mr. Kottler: This is cross-examination.

A. At Panama they had asked for—they asked me for it, they asked for $50, I gave them $50.

Q. Do you remember that it was exactly $50?

A. Your customer should remember.

Q. Do you remember, Captain?

A. No, I don't remember.

P. 47-a:

Q. And you have made the statement that all the money you paid to the men was money that they had earned, is that right?

A. Yes. Do you mean the paying—the payment when they were paid off? That was the discharge payment—or do you—

Q. I am referring to the payments made, which you say you think were made at Panama.

A. If I gave it to them they had earned it.

Q. That is what you have testified, isn't it?

A. Yes.

Q. Now, are you sure of that?

A. Sure.

P. 86:

Q. *Is it your testimony, Captain, that at no time during the entire period that the petitioners herein were aboard your vessel were they ever advanced money beyond the sums actually due them for wages earned? Now is that your testimony, your absolute testimony beyond a question of doubt? I want that. Get it very carefully now.* (Italics Ours).

A. *Yes. They had never any advances that they didn't earn.* (Italics Ours).

In view of this testimony the petitioners cannot in good faith state (as they have done in the second question presented in the petition for certirari), that the facts of the case on which petitioners obtained a recovery of alleged illegal advances were undisputed!

The very fact that there was a bona fide dispute between the seamen and the shipowner is *sufficient cause* for withholding a second payment of the alleged

advances. This was one of the points discussed by Justice Eggleston of the Supreme Court of Appeals of Virginia in the case of *Neapolidis et al v. Theofana Maritime Co. et al.* (The MEANDROS), 192 Va. 90, 63 S. E. (2) 795 at page 799:

> "The claim here for double pay or liquidated damages on this item is entirely without merit. It is well settled that the refusal to pay because of a defense made and asserted in good faith, even though unsuccessfully, does not constitute a withholding 'without sufficient cause' so as to subject the master and owners of the vessel to the penalty of this statute. See The VELMA L. HAMLIN, 4 Cir., 40 F. (2) 852, 854, 855, and cases there collected; KORTHINOS v. NIARCHOS, supra, 4 Cir., 175 F. (2) at pages 733-734."

See also *Collie v. Fergusson,* 281 U. S. 52, 50 S. Ct. 189, 74 L. Ed. 696.

Moreover in factual situations practically the same as in this case, the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit have refused to allow any recovery of "waiting time" under the provisions of 46 U.S.C.A. Their decisions have been before this Court which has in each case denied certiorari, *The VIRGINIA,* 1950 AMC 1158, 148 F. (2) 716; certiorari denied April 9, 1951. *The CAPT. K. PAPAZOGLOU,* 175 F. (2) 735; certiorari denied 338 U. S. 894, 70 S. Ct. 241, rehearing denied 338 U. S. 939, 70 S. Ct. 345.

In the reported opinion of Chief Judge Parker of the 4th Circuit 175 F. (2) 730, it is stated at page 733:

> "We do not think, however, that the failure to pay again the amount of advances after there

has been a settlement in good faith and the amount of wages due the seamen has actually been paid with no question raised as to the legality of the advances, can be said to be a failure to pay wages 'without sufficient cause' so as to subject the vessel to a claim for double wages under the provisions of 46 U.S.C.A. 596."

The Virginia Supreme Court reached this same conclusion in *The MEANDROS* case supra.

This Honorable Court has refused on two prior occasions to review the decisions of the United States Court of Appeals for the Fourth Circuit dealing directly with this same question, among others.

The *VIRGINIA,* supra.

The *CAPT. K. PAPAZOGLOU,* supra.

With the foregoing authority and precedent, the Courts below correctly refused petitioners any recoveries for waiting time under 46 U.S.C.A. 496 as that section of the code is not mandatory.

Petitioner Stefanidis obtained a recovery of eighty dollars ($80.00) as two-thirds of one month's salary (R. 92). However, the Courts below refused to grant a waiting time recovery based on this sum.

The testimony of Captain Kakaroukas covers the background of this recovery in great detail (Pp. 27-33, 70-79, Deposition of Capt. Kakaroukas). We shall not quote that testimony as it is too lengthy; but, in way of brief summary, the evidence showed that Stefanidis had gotten into considerable trouble while employed aboard the ship. Just prior to sailing from Alexandria, Egypt, for Newport News, Virginia, in June 1948, this seaman was returned to the vessel by Egyptian police officers with instructions that he had to sail with the ship. Previously the man had been discharged. He performed no duties during the voyage and had entered

into an agreement whereby he would leave the ship at Newport News, Virginia. This is expressed at page 76 of the Kakaroukas deposition, as follows:

> "Q. During the trip from Alexandria to Newport News did you make any log entry about Stefanidis not working?
>
> A. No, nothing, but I had a slip of paper signed by the Consul and the chief mate and himself that he would stay on board the ship until we reached Newport News where he would leave the boat without wages."

Upon arrival at Newport News, however, Stefanidis was ordered detained as a malafide seaman by the U. S. Immigration Service. Nevertheless, he did of his own accord leave the vessel and the shipowner was forced to pay a fine to the United States for this seaman's actions. (Page 27, deposition of E. O. Douglas).

Stefanidis instituted this action at Newport News and by agreement between his attorney and the respondent ship master, he was reinstated as a member of the crew with the promise that he would receive the sum of money he would have earned during the twenty (20) day voyage from Alexandria, Egypt, to Newport News, Virginia, had he been a member of the crew.

The recovery of eighty dollars ($80.00) granted by the Courts below consummates performance of the agreement which this man's attorney had made with the master of the S/S ATLANTIC TRADER. This sum of eighty dollars ($80.00) is but the consideration of the agreement. As such it is not properly the basis for a waiting time recovery under 46 U.S.C.A. 596 and the Courts below correctly so held.

C. Petitioner Ntogris Has Recovered All to Which He Is Entitled.

The third and final question raised in the petition for writ of certiorari seeks only a review of fact. As discussed under Section III of this brief, the findings and decisions of fact, made in the Courts below are not subject to review. They do not raise any important Federal questions and are not in conflict with decisions of any other courts.

Applying the evidence presented to him to the legal principle that a seaman may recover from his shipowner any advances of unearned wages made in the United States or its possessions, the trial judge found that Ntogris had received only one illegal advance of unearned wages while in a possession or territory of the United States. Page 67 of trial proceedings:

> "Court: I'm in just as good position to decide it right now as I'll ever be in my life. I read them all a couple of times. I'm going to give judgment against—who owns the ship, S. Livanos and Company?
>
> Mr. J. Morewitz: No, they're the agents.
>
> Mr. McCoy: Atlantic Maritime Company of Panama, Incorporated.
>
> Court: You all know who the defendant is. Give judgment for Ntogris in the sum of $122.00 for advance made which he said left him actually owing the ship $122.00. Apparently they made him an advance of $100.00 and $122.00. *I'm allowing him $122.00 in advance, not the $100.00*

because his own evidence is that he got back from Chile and got back to Panama they gave him the $100.00 to send home to his family and that he had been on the ship some time and earned it. The $122.00 isn't contradicted by any evidence so I'm going to give judgment in his favor for $122.00."

Accordingly, judgment was entered for this amount (R. 92).

V. CONCLUSION

The respondents submit that the decision of the Corporation Court of the City of Newport News is eminently correct.

This view is shared by the Supreme Court of Appeals of Virginia, which, by refusing to review the case, has affirmed the actions of the trial court.

The many and varied claims asserted by the petitioners were based on questions of fact which the Courts below resolved in favor of the respondents. The decisions of the Courts below are based on ample and substantial evidence.

There is no real conflict of authority as to the basic legal principles involved. There are no new or novel questions needing further clarification. The validity of any statute or treaty of the United States or of any State is not drawn in question. There is no question of general interest warranting the granting of a writ of certiorari in accordance with the petitioners' application.

For these reasons the decrees of the Supreme Court of Appeals of Virginia and of the Corporation Court of the City of Newport News, Virginia, should not be disturbed and a writ of certiorari should be denied.

Respectfully submitted,

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